The Relationship between Mother and Child Born with Gestational Agreement in IPL — with the Proposals of New Legislation

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1. Introduction

More than twenty years have passed since the weird words "Surrogate Motherhood" were first used. "Surrogate Mother" has two meanings; one is where the egg of the birth mother is fertilized by the sperm of the intended father, and the other where the egg is that of the intended mother or a third party donor, which is generally called "rental womb". Baby M case, which began the world-wide spread of the term "Surrogate Mother", is the former type. In that case, the issue of the custody of Baby M was determined solely from the viewpoint of the child’s best interests, but this case could be covered with the traditional legal rules, because the separation of "mother" into an egg-donor and a gestational mother could not be found.

The latter, however, has caused a serious problem that will shake the very basis of family law. For in this latter case, we have to legally determine "mother" which is the key-stone of parental relationship. We have so far distinguished a real mother and a foster mother, but have never faced the situation of the separation of "real mother". Now the development of reproductive technology has made it possible to separate "mother" into an egg donor and a gestational woman, over and above that, to separate an egg into a core-donor and a donor of an egg-cell without a core.

In fact, the news that a sixty-year-old Japanese woman gave birth to a child using an

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1) Some contest the use of "surrogate mother" to the former type, because the woman who gives birth to a child is its genetic mother. Therefore she is a true mother who should not be called a "surrogate mother". The former type is sometimes called "partial surrogacy" and the latter "full surrogacy". See "Surrogacy in Israel: An Analysis of the Law in Practice" by Rhona Shuz in "Surrogate Motherhood International Perspectives" p.36
3) There are many theses about "Surrogate Motherhood" of this type, but the fact that quite a few of them discuss the validity of the surrogacy contract and its enforceability from the ethical or feministic view should show that the maternal relationship of the child born with surrogacy in this way can be coped with by the traditional legal system.
egg donated in U.S.A. was carried in the newspaper of August 7th of 2001). Another topic is that a famous TV-talent has gotten the twins by transferring the embryos produced with her egg and the sperm of her husband into the womb of an American host-mother. In these cases, the Ministry of Justice faced a difficult problem— who should be registered as the "mother" of these children in Koseki (戸籍 – Japanese family register)?

In the latter case, it is necessary to determine a "mother" not only at the level of substantive laws, but also at that of conflict of laws, because these reproductive practices are carried out in foreign countries rather than at domestic hospitals, so that from the first we should face an international legal parental relationship. In spite of the situation where at the level of substantive laws, the definition of "mother" is not fixed, the present Horei (法例 – Japanese International Private Law) has to deal with this problem, but is it successful? What will result from the difference of the definitions of "mother" at the level of substantive laws of each country in international parental relationship? In the following, I show the result and the problems of application of the present Horei. Then I will set some guidelines for new International Private Law (IPL) from that result, and propose some ideas for new legislation.

2. The problems under the present Horei

Mainly three Problems could be found as the result of application of the present Horei; (1) the remains of the conflict of substantive laws, (2) the relevance of chosen law under the Horei as applicable law, (3) the overusing of ordre-public. To show these problems clearly, it is better to see some cases in the following. In those cases, two definitions of "mother" at the level of substantive laws, an egg-donor and a gestational mother, are used.

(1) The remains of the conflict of substantive laws

i. The present Horei regulates the establishment of the parental relationships of legitimate and illegitimate children separately. §17 I of the Horei regulates that a child shall be regarded as legitimate if a child is regarded as legitimate under either of national laws

4) This woman has published a book about her experience; Kageyama Yuriko (影山百合子) "Arigatou, akachan – 60sai hatushussan no monogatari (ありがとう, 赤ちゃん–60歳出産の物語)" Koubunsha(光文社) 2002.

5) In foreign countries, we can find a case that instead of a daughter who has no womb, her mother gave birth to a child by using the embryos with the daughter's egg and her husband's sperm. See "Sobo ni yoru dairihaha no rimriteki kousatu(祖母による代理母の倫理的考察)" by Hoshino Kazuma(星野一正) in Toki no Hourei (時の法令) no.1636, p.62. Furthermore, it is not certain whether it is true or not, TV-report of December 27th of 2002 told that the company in Switzerland called AID might have succeeded in the birth of clone-child.

6) Moreover we can find the legislation where one who has the intention to become a mother should be "mother", ex. Uniform Parentage Act (2000, revised in 2002) §801.
of the couple, and the former part of §18 I regulates that the establishment of the paternal relationship of an illegitimate child is governed by the national law of an alleged father, and the establishment of maternal relationship of an illegitimate child is governed by the national law of an alleged mother. In order to use either of article 17 or 18, it is better to use very simple cases here.

1. An A national has made a surrogacy-contract with a B national and the B national gives birth to a child for the A national by using an egg of the A national.

2. An A national gives birth to a child by using an egg of a B national.

If both parties of the cases mentioned above have spouses of the same nationality, each applicable law of these cases is determined by §17. If they are not married, §18 shall apply to each case. In both cases, the A national law determines whether or not the A national will be the "mother" of a child, and the B national law determines whether or not the B national will be the "mother". Now we suppose the definition of "mother" of each country as follows;

A national law----birth mother
B national law----egg donor

Then the "mother" of a child can be shown in the table below;

<table>
<thead>
<tr>
<th>Applicable law</th>
<th>A national</th>
<th>B national</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case①</td>
<td>not mother</td>
<td>not mother</td>
</tr>
<tr>
<td>Case②</td>
<td>mother</td>
<td>mother</td>
</tr>
</tbody>
</table>

From this table, we can find that a situation in which the child born with surrogacy has plural mothers or no mother will arise, when the definition of "mother" varies between countries. This means that as the result of the application of conflict-rule, whose main task is to resolve the conflict of substantive laws, the conflict still remains.

ii. The cause of the remaining conflict

Why does the conflict of the substantive laws remain after the application of conflict-rule? This could be due to the way IPL poses the question.

The main role of IPL is to choose the national law which has the closest connection to a legal issue. The question that we are now facing is "Who is the mother of the child
born with surrogacy?”, but the real litigation cannot but see the question in the form of "Is this A national the mother of this child?" or "Is this B national the mother of this child?". If we want to decide the "mother" of a child born with surrogacy, we should answer these two questions simultaneously. However, the applicable law as the most closely connected law to the issue is chosen in each question, ignoring the mutual relation between these questions. The table above shows the result of the way IPL addresses this problem.

(2) The relevance of chosen law as the most closely connected law.

The present Horei, as mentioned above, regulates the establishment of the parental relationships of legitimate and illegitimate children separately, and article 17 uses the alternative connection of the national law of a husband or a wife. This means that when at least either a commissioning woman or a gestational mother is married, the national law of her husband might become an applicable law. The alternative connection is, to be sure, a very effective means to avoid the absence of "mother", for this connection approves the plural applicable laws. In certain circumstances, however, some problems may arise, which the following cases will show;

1. Here we suppose that there should be two definitions of "mother"; birth mother and genetic mother (egg donor) and there are two couples related to the surrogacy. Then the number of the combinations of the definition of "mother" is the 4th power of 2, that is, there are 16 combinations of "mother". In those cases, there is no problem when all the national laws of the related parties take the same definition of "mother". In the case where the national laws of a husband and a wife of each couple have the same definition of "mother", but the definitions of both couples' national laws are different, the results are the same as the cases mentioned above, 1 and 2.

But what about the other cases? Now suppose that there are two couples; X and Y, and the definitions of "mother" of the national laws of a husband and a wife vary in each couple.

3. the wife of X gives birth to a child by using an egg of the wife of Y.

4. the wife of Y gives birth to a child by using an egg of the wife of X.
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We can see the results in the table below:

<table>
<thead>
<tr>
<th>Couple</th>
<th>X</th>
<th>Y</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nationality</td>
<td>Husband</td>
<td>Wife</td>
</tr>
<tr>
<td></td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Applicable law</td>
<td>A national law (nl)</td>
<td>B nl</td>
</tr>
<tr>
<td>Mother</td>
<td>genetic mother</td>
<td>birth mother</td>
</tr>
<tr>
<td>Case 3</td>
<td>not mother</td>
<td>mother</td>
</tr>
<tr>
<td>Case 4</td>
<td>mother</td>
<td>not mother</td>
</tr>
</tbody>
</table>

Then in case 3, the wife of X couple will become a "mother" under her own national law, and the child born with surrogacy will be the legitimate child of her husband. The wife of Y couple will also become a "mother" under her own national law, and the child will be legitimate as her husband’s child. On the contrary, in case 4, the wife of X couple will become a "mother" under her husband’s national law, and the child will be legitimate under the same law. In the same way, the wife of Y couple will become “mother” under the national law of her husband and the child will be legitimate.

In case 3, the national law of either of the wives determines a "mother", and because of the difference of the definition of "mother" between these two countries, there are two legal mothers, but in case 4, these wives will become "mother" under the national laws of their own husbands. The problem is whether the national laws of those husbands are really relevant as the applicable laws which shall determine a "mother".

ii. The reason for doubting the relevance as an applicable law

Why should the relevance to determine a "mother" under the national law of the husband of a woman in question be doubted? The main purpose of article 17 of Horei is to determine whether a child is born in wedlock, that is, this article focuses only on the legitimacy of a child. In order to admit the legitimacy of a child as much as possible, article 17 uses the alternative connection7). To be sure, before the amendment of Horei in the 1st year of Heisei, the article 17 prescribed that "the national law of the mother’s husband" shall be an applicable law. Then it is not the first time to find the possibility to determine the legitimacy of a child under the law which is not the national law of the mother. However, this former rule was not required to determine a "mother". Prof.Tameike explained the rationality of this former rule.

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7) Minami Toshifumi," Kaisei Horei no Kaisetsu(The commentary of Amended Horei)" (南敏 「改正霍いの解説」) 1994, p.106
rule as follows8);

"The legitimacy of a child is related to the determination whether a child is born between a wife and a husband (a mother and a father). Then this is related to both a mother and a father, but the main concern lies in the identification of a father, and on the base of this identification, a child shall be born in wedlock, that is, a child shall be born between a couple in question. In the substantive law, the main problems about the legitimacy are the presumption of legitimacy and its denial. The former is the confirmation of the paternal relationship, and the latter is its denial, so either of those matters focuses on the paternal relationship."

The present rule applies the alternative connection of both national laws of a mother and a father, considering the equality of man and woman, and the protection of a child. Even so, the system of legitimacy focuses on the paternal relationship from the premise that the "mother" can be determined through the fact of birth, as Professor Tameike has pointed out. In other words, the legislator of the present rule didn't anticipate the possibility of the separation of "mother". Now we can not maintain this premise, we cannot say with confidence that the applicable law decided by the article 17 is relevant as the most closely connected law to determine a "mother".

The very problem that we are facing now is that the basis for the present system of parental relationship has collapsed. The division between a legitimate and an illegitimate child is certainly significant when there is no other way for reproduction but to have sexual intercourse and the idea that a child-birth should occur in a wedlock is firmly maintained. In other words, the marriage should be the premise for a child-birth, but the development of reproductive technology has made marriage and reproduction separate. It is not too much to say that here we could find the root of the inadequacy of the present law.

(3) The risk of the overusing the clause of ordre public

One possible means to solve the problem of multiple "mothers" or the absence of a "mother" is to use ordre public.

In Japan, the Supreme Court9) ruled that the maternal relationship should be established through the fact of delivery of a child. After this decision, the Ministry of Justice published the Intermediate Tentative Draft(Intermediate Tentative Draft of Special Rules of the Civil Law concerning the Parental Relationship of a Child Born with the Assisted Reproductive Medicine Using the Donated Eggs, Sperm or Embryos)10) in July, 2003, which prescribes that "mother" shall be a woman who gives birth to a child.

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8) Tameike Yoshio, "Chakusyutukettei no Junkyohou ni tuite (The applicable law of legitimacy)" in "Kokusai kazokuhou no kennkyu" p.240 (渡池良夫「親系決定の準拠法について」国際家族法研究)
9) the decision of 27 April 1962, Minshu (民法) vol.16, no.7, p.1247
10) Intermediate Tentative Draft of Special Rules of the Civil Law concerning the Parental Relationship of a Child Born with the Assisted Reproductive Medicine Using the Donated Eggs, Sperm or Embryos (「精子・卵子・胚の提供等による生殖補助医療により出生した子の親子関係に関する民法の特例に関する要綱中間試案」)
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i. Now supposing that the Japanese law should regulate about "mother" in the same way as the Tentative Draft and see the results for the following 5 and 6 cases, which are a little changed from the cases of 1 • 2. Here the law of B is supposed to be the same as mentioned above.

5 A Japanese has made a surrogacy-contract with a B national and the B national gives birth to a child for the Japanese by using an egg of the Japanese.

6 A Japanese gives birth to a child using an egg of a B national.

We can see the results in the table below:

<table>
<thead>
<tr>
<th>Applicable law</th>
<th>Japanese</th>
<th>B national</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Mother”</td>
<td>birth mother</td>
<td>egg donor</td>
</tr>
<tr>
<td>Case 5</td>
<td>not mother</td>
<td>not mother</td>
</tr>
<tr>
<td>Case 6</td>
<td>mother</td>
<td>mother</td>
</tr>
</tbody>
</table>

Of course, these results are the same as those of 1 • 2 cases. However, in case 5, the result of no "mother" could be avoided, if the B national law is excluded by ordre public. The same applies to case 6. If the B national law could be excluded by ordre public, the child would have only one "mother", and even in the case of fighting for the rights of parentage over a child like the case of Baby M, "mother" could be decided under the Japanese law. If the wife of X-couple in cases of 3 • 4, the same results can be gotten using ordre public.

ii. The problem of the use of ordre public

Why can we use ordre public here? The reason is that the result of no "mother" or plural "mothers" is a grave situation for a child and this situation would arise because that the B national law gives a different definition of "mother" from that of Japanese law, which is the key-stone of the family law.

But is it adequate to use ordre public? The exclusion of foreign law is an exception to the basic principles of IPL. Therefore the use of ordre public can be permitted only under the strict conditions in exceptional cases. The requirements in order to operate the clause of ordre public are as follows;

1. There is a close connection between the case and the forum country (Japan),
2. The result of the application of foreign law is contrary to *boni mores* of the forum country.

In this latter requirement, the word "result" is inserted because the exclusion should not be admitted only when the foreign rules prescribe differently from Japanese law. To operate *ordre public*, the application of foreign rules should produce a result inconsistent with some fundamental principle of the law of the forum.

However, the reason indicated above to exclude the B national law seems to stress on the difference of the contents between two laws. For a child born with surrogacy, the result of plural "mothers" or no "mother" is, to be sure, grave and serious. But is the result of the application of B national law against *boni mores* in Japan? The B national law prescribes that "mother" shall be a genetic mother, and Japanese Nationality Law applies *jus sanguinis*. Then the genetic mother should be a "mother". The Tentative Draft is said to take it into consideration that when a child is born, a mother is always with the child, so that, if a birth-mother shall be a "mother", there will be few cases where the child cannot find its mother. If it be true, it cannot be said that the B national law should be contrary to *boni mores* in Japan. Because that consideration doesn't seem to be far more important than to maintain *jus sanguinis*.

Furthermore, in case where a wife might become a "mother" according to her husband’s national law, the use of *ordre public* would be more easily admitted because of the doubt about the relevance of the applicable law as the most closely connected law.

To use of *ordre public* so many times can be criticized not only because it shows the "homewards trend" but also because *ordre public*, which is originally used exceptionally, will become a general rule. Besides, the use of *ordre public* can cause a limping legal-relationship. If in case, the B national law can be excluded by *ordre public* and the B national is admitted a "mother" in Japan, it is very doubtful whether this result will be recognized in B state. This means that the fighting for or against the rights (or responsibilities) of parentage over a child between private individual parties results in states’ fighting for or against these rights (or responsibilities) each other.

Moreover, there are various forms of action; some cases can be found in which the parties are in contention about who is the mother of a child born with surrogacy, and other cases in which the parental relationship would become a very important issue in the claim of maintenance, custody, succession and so on, that is, the parental relationship is treated as the preliminary or incidental issue in these cases. *Ordre public* often finds some difficulty in working on the preliminary issue. Then in the claims of maintenance, custody or succession, where the issue of the existence of parental relationship is treated as a preliminary problem, if *ordre public* doesn’t work, the B national law will apply in such a case. Which form of action to be taken depends on the strategy of each party. Then the same relationship will be judged under the different applicable laws, which will result in a very uncertain situation for the parties. It is desirable that the parental relationship is one and the same.
whatever the circumstances may be. However, to use ordre public runs the risk of making this relationship relative and uncertain.

3. The solution for problems with the present Horei

Is it necessary to amend the present Horei to solve the problems mentioned above? The articles after §13 of the present Horei were amended largely in 1989. More than 10 years have passed since the former amendment, but it is not good to amend the law so often. Then if possible, a solution without amending the present Horei should be adopted. In the following, we will examine two possible solutions.

(1) To fix the definition of the connecting point

The greatest problem mentioned above is the remains of the conflict of substantive laws. The cause of this problem has been pointed out; the applicable laws to the questions which have to be solved simultaneously are chosen separately without paying attention to the mutual relation between those questions. Then the solution that the definition of the connecting points should be fixed through interpretation is proposed. If it can be accepted, one and the same connecting factor is always used, which means that the applicable law is the same to all the questions.

i. To give a concrete example, a "couple" of §17 of Horei is interpreted as a woman who gives birth to a child, and her husband, so that the connecting points used in §17 should be their nationalities. On the contrary, it is possible to interpret a "couple" of §17 or "mother" of §18 as a woman who provides an egg. In short, the nationality as a connecting factor should be fixed on either that of a woman who gives birth or an egg-donor in every case.

Then what results can be obtained by using this idea? It is easy to see the results of applying this idea with the following simple cases;

7. A Japanese couple have made a surrogacy contract with a foreign single woman and this foreign single woman gives birth to a child by using a fertilized egg of the couple.

8. The wife of a Japanese couple gives birth to a child by using an egg of a foreign woman.
In both cases, the nationality of a foreign single woman will be supposed in two ways;


The definitions of "mother" are supposed as follows;
- A national law ----- birth mother
- B national law ----- genetic mother (egg donor)
- Japanese law ----- birth mother

A "couple" or "mother" in §17 or §18 of Horei is supposed to be a woman who is a birth mother.

Then in case (7), the nationality of a foreign woman is a connecting factor, therefore the applicable law is the national law of the foreign woman. On the contrary, in case (8), the connecting factor is the nationality of a Japanese and the applicable law is Japanese law. The results can be seen in the table below;

<table>
<thead>
<tr>
<th>Connecting Factor</th>
<th>Nationality</th>
<th>Applicable Law</th>
<th>Mother</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case (7) the nationality of a foreign woman</td>
<td>A nationality</td>
<td>A national law</td>
<td>foreign woman</td>
</tr>
<tr>
<td></td>
<td>B nationality</td>
<td>B national law</td>
<td>Japanese wife</td>
</tr>
<tr>
<td>Case (8) the nationality of a Japanese wife</td>
<td>Japanese</td>
<td>Japanese law</td>
<td>Japanese wife</td>
</tr>
</tbody>
</table>

ii. Problems with this solution

If this solution is accepted, all the questions which need to be simultaneously answered can be solved under the same applicable law, and the problem of the remains of the conflict of substantive laws will disappear. However, there still remains a problem, that is, the relevance of the applicable law as the most closely connected law. In case (7), the Japanese wife can be a "mother" according to B national law when a foreign woman is a B national. Could this result be recognized in Japan? It is difficult to answer in the affirmative, because when amending the Present Horei in 1989, the principle of national law, that the status of a person should be tested by his/her nationality, is maintained. Moreover, the establishment of parental relationship is deeply related with the acquisition of Japanese nationality by birth. In principle, the Japanese nationality Law requires a parental relationship admitted by Japanese law as a basis to acquire Japanese nationality by birth. Considering these points,
it can be said that this solution has serious problems we should not neglect to address.\footnote{11)
After the amendment of Horei in 1989, §17 has adopted an alternative connection of a couple's nationality. Therefore a child born to a couple of a Japanese and his/her foreign spouse has the possibility to acquire Japanese nationality by birth based on the parental relationship under foreign applicable law. According to Minami's commentary of the Amended Horei(op.cit.p.105),such a case would be very rare. However, he states that when it occurs, it will bring the same result as the \textit{de facto} change of the Japanese nationality law. It is indeed a grave problem that there are a significant number of cases in which children can obtain Japanese nationality due to an interpretation of Horei rather than through legislation.
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If the B national law may be excluded by ordre public, it would eventually result in the absence of "mother". On the other hand, it is difficult to restrain ordre public from excluding a foreign applicable law like §801 of U.P.A.(Uniform Parentage Act, revised in 2002) which admits an intended "mother".\footnote{12) See supra, footnote 6}

\textbf{(2) The legislation of special law}

The legislation of special rule for a maternal relationship about a child born with surrogacy could be one way to deal with this situation without the amendment of the present Horei. At the level of substantive law, the way to legislate special rules for a maternal relationship in a surrogacy case is being sought. Therefore the special rules at the level of conflicts of laws are also to be considered when applying these special substantive laws. At present, surrogacy has become a big topic, but actually the frequency of surrogacy-use is low and is unlikely to rise in the future\footnote{13) Schutz," Surrogacy in Israel: An Analysis of the Law in Practice" in the "Surrogate motherhood International Perspectives" ed. by Cook and Sclater(2003), p.37. According to her research, the number of intended couples showing interest in surrogacy in the last couple of years is substantially reduced.}\. This being true, it is natural to doubt the necessity to amend the Horei in general for such very rare cases.

Practically, it would be very difficult to apply these special rules. One reason is that it is not easy to catch the actual incidence of surrogacy. In particular, egg-donor cases are as difficult to uncover as AID cases. Besides, when surrogacy is carried out in foreign countries, it is impossible to find these cases without testing DNA\footnote{14) The case which is presented at Introduction, which the Ministry of Justice faced the issue of surrogacy for the first time, was discovered because the Japanese woman who was to be registered as a "mother" was over sixty years old. In Japan, According to the direction of the director-general of the civil affair bureau in 1961, when a woman whose name is given as "mother" on the notification of birth is over fifty years old, it should be investigated whether she really gave birth. If a woman is under fifty, the notification may be accepted only without further investigation.}. This means that there would be a great confusion when registering a child birth. Furthermore, a case where a mistaken egg is used may occur, which can be found in the recent news. Can we count this case in "surrogacy"? One more thing to take into consideration is the world-wide trend to stop the discrimination between a legitimate child and an illegitimate one. Therefore, it is better to amend the Horei as a general law for all parental relationship.
4. Guidelines for legislation

(1) Main Principle

What is the most important thing in legislating a new conflict-rule for a parental relationship? It should be "the best interests of a child" or "child's welfare". It is no exaggeration to say as follows; "the best interests of a child" or "child's welfare" at the level of conflict of laws means that the difference of substantive laws should not be allowed to create a situation in which a child has no "mother".

There are certainly two questions arising from this statement; 1. Does the absence of "mother" matter when a child has a "father"? 2. Will the number of cases of multiple "mothers" increase when all the efforts would be devoted toward the solution of no "mother"?

 Eventually these questions have their root in the doubt whether the basic idea of family law that every child should have only one "father" and only one "mother" should be maintained, which is not peculiar to the conflict of laws. It may be time to reconsider the fundamental ideas of substantive family law, which have long been considered natural and common. The questions we need to address pertain to the definitions of "marriage", "family", "father", "mother" etc. at the both levels of substantive laws and conflict of laws. However, at present when the direction of future legislation of substantive laws is unclear, the new rules of conflict of laws should be made on the premise that a child has at least one "father" and one "mother".

What is evident for new legislation is that it cannot be a prerequisite for the new rules that a maternal relationship can be naturally and uniformly decided through the fact of delivery of a child. A baby born between a couple might neither be legitimate nor a couple's child, because the wife and the husband has no genetic connection with this baby. Then it is not adequate to regulate the parental relationships by dividing them into legitimate and illegitimate relationship, because the fact that a baby is born in a wedlock has no meaning to determine his/her parents. If so, paternal and maternal relationship should be regulated independently.

 In order to avoid the absence of "mother" or plural "mothers" as the result of applying the substantive laws, it is better to use the partial unilateral approach (which admits homewards trend) or substantive approach rather than the complete and impartial multilateral approach. So the priority of internal laws or the discretion of judges is necessary. On the other hand, doing so, the overuse of ordre public should be restrained.

Furthermore, considering that surrogacy is similar to an adoption before a birth, and that an adoption is necessary for a woman who cannot be admitted a "mother" but intends to be a "mother", it is desirable to maintain consistency with the applicable law of adoption.
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(2) Guidelines for new legislation

i. To consider the child’s best interests that is, not to cause a situation in which a child has no mother.

ii. To restrain the use of ordre public

iii. To be consistent with the applicable law of adoption.

iv. To decide an applicable law independently for each parental relationship, that is, not to relate the paternal relationship to the maternal relationship, and not to regulate a legitimate and an illegitimate child separately.

5. The proposals of the new legislation

What legislation can be considered after the guidelines mentioned above? First, the use of a connecting factor which could choose one and the same applicable law for as many parental relationships as possible can be considered. If this can be done, the problem of the remains of conflict of substantive laws would be solved. If this is not possible, a connecting method with some device can be proposed. Then there will be thought some kinds of new legislation as follows;

(1) Legislation

A. Through the device of a connecting factor;
   "The parental relationship is governed by the law of a habitual residence of a child at birth."

B. Through the device of connecting method;
   I. To adopt an alternative connection for regarding as many laws as possible as an applicable law----ex. EGBGB§19 (1)15)
   II. To adopt the cascading connection; it can be considered to set priorities on the national law or the law of habitual residence of a gestational woman, an egg-donor or a committing woman, and the law of habitual residence of a child at birth. When setting priorities on these connecting factors, some policy has to be strongly considered. For example, in Japan the highest priority would be given to the nationality of a gestational woman, and the next priority to that of an egg-donor. The next applicable law will apply when applying the

law of higher priority results in no "mother".

C. To maintain the principle of national law, with respecting the traditional approach as much as possible. The proposal of a new legislation is as follows;

1. The establishment of parental relationship is governed by the national law of each parent at the birth of a child. When a parent is dead at the birth of a child, it is governed by his/her national law at his/her death.

2. Where no maternal relationship is established according to paragraph ①, it is governed by Japanese law.

3. Where plural paternal/maternal relationships are established according to paragraph ①, the court shall decide on a father/mother considering the best interests of a child, provided that this does not apply where a parental relationship is established by Japanese law.

(2) Problems with the legislations mentioned above.

Though it is not possible to pose the question at court; "Who is the mother of this child?", proposal A, which says that "The parental relationship is governed by the law of habitual residence of a child at birth", can solve the problem of the remains of conflict of substantive laws. This is because this legislation uses the connecting factor which centers on the child, so that the applicable laws of parental relationships are the same whoever may claim to be the child's parent. However, this cannot be accepted, for "the habitual residence of a child at birth" is always the same as that of gestational woman. Besides, it is not desirable that a maternal relationship between a Japanese woman and a child should be governed by foreign law, even when this Japanese woman gives birth to the child in a foreign country without using surrogacy.

The use of alternative connection will cause a problem, especially from the standpoint of the nationality law, because the establishment of parental relationship under foreign law should be recognized, which has been previously mentioned.\(^\text{16}\)

Moreover, to admit many applicable laws for one legal relationship in order to avoid the absence of "mother" will erode the basis of IPR. Furthermore, §17 of the present Horei is criticized, because the alternative connection makes the denial of a legitimate relationship difficult, while furthering the possibility of establishment of parental relationship. §19 of EGBGB uses not only the alternative connection but the "habitual residence of a child" regardless of time as a connecting factor. The connecting method of this article is, so to speak, the "timeless alternative connection". Therefore, one can claim, as an applicable law, the law of the habitual residence which the child has gotten even in twenty years after

\(^{16}\) Supra.p.
his/her birth. In short, this rule will bring some instability in the parental relationship, which should be stable and fixed, so that there is a constant risk that the parental legal relationship would be changed.

As for the use of a cascading connection, it will have a certain flexibility towards the various problems that will arise, so that it seems to be a desirable solution. However, the cascading connection used in the present Horei is quite different from that of the proposals mentioned here. According to the cascading connection used in the present Horei(§§14,15, 16, 21), we should go to the next step of the "Kegel's ladder", when the applicable law of higher priority cannot be decided. The next placing applicable law should not be searched when the result of applying the first ranking applicable law is not desirable. If this is admitted, it is nothing but a hidden "result-oriented" connection or "favour approach". Moreover, if ordre public is used here, this connection is apt to be used for obtaining an arbitrary result. Such a connection will be the cause of confusion when registering a child's birth.

Proposal C can be criticized, because it favours the Japanese law. There will be further doubts whether this rule might solve the problem of the remains of conflict of substantive laws. When ② is applied, Japanese law governs the maternal relationship, so that it results in a situation that a "mother" should be a foreign woman in a foreign country. It is doubtful if this result would be recognized in that foreign country. Proposal C will not settle these doubts directly, but it means that in Japan, the foreign woman is a "mother" and that when a woman other than this foreign woman may want to become the "mother", she should adopt the child. Therefore, this rule maintains consistency with the rule of adoption in the present Horei. It cannot be said that this model rule is perfect, but at least it is better than the other proposals.

6. Conclusion

The complete and infallible legislation that can solve all problems cannot be found, but as a better rule, proposal C is to be recommended, nevertheless there will surely be some pitfalls when applying it practically. However, in spite of the challenge of high reproductive technology to the family law, almost all people are still forming families in traditional, age-old ways. It is true that some change should be necessary, but it would not be worth the risk of the greatly changing the traditional method of IPR.